Supreme Court, U.S.
FILED
94 137 JUL 19 1994
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PERRY F. SEAL, JR.,

PETITIONER,

vs.

KATHLEEN F. SEAL,

RESPONDENT.

# PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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Pro se

74 pp

## QUESTIONS PRESENTED

1. Can a nation facing the stiffest of international economic competition allow state divorce courts to engage in state-sanctioned redistribution of wealth that results in the taking of property without just compensation? Can the complete destruction of a valuable economic entity be compatible with the Fifth and Fourteenth Amendments?

2. How much burden will the Constitution allow our increasingly expensive legal system to place on productive segments of our society?

3. Does the Constitution require that cases be decided by rules of law, rather than having courts reach preordained results in favor of the greatest perceived victim, as was done in this case? What does the Constitution require in the way of minimum factual evidence to support a judge's discretion in making property distributions?

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Petitioner Perry F. Seal, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal entered on January 31, 1994,

which the California Supreme Court summarily refused to review by order of April 20, 1994.

## OPINIONS BELOW

The relevant unpublished judgments/opinions of the California state courts appear in Appendix A to this petition.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Review is sought of a judgment entered on March 12, 1992. Timely notice of appeal was filed on June 19, 1992. The California Court of Appeal's opinion affirming the

judgment was filed on January 31, 1994. A timely petition for rehearing in the California Court of Appeal was denied on February 25, 1994. A timely petition for review by the California Supreme Court was deni . on April 20, 1994. This petition is filed within 90 days of the entry of denial of a Petition for Review by the California Supreme Court on April 20, 1994 and is therefore timely under Rule 13.1 of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment Five:

> No person shall ... be deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment Fourteen:

> .... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the qual protection of the laws.

## STATEMENT OF THE CASE

This petition is filed in response to a judgment regarding the financial aspects of a divorce case, which has been affirmed by the California Court of

Appeal (See Appendix A). A request for review by the California Supreme Court was summarily denied on April 20, 1994. Pursuant to Rule 14(h) of the Rules of the Supreme Court of the United States, petitioner discloses that the federal questions sought to be reviewed were not raised or passed upon by the state trial and appellate courts. However, because of the magnitude of the importance of the issues presented here, petitioner asks that certiorari be granted.

Perry and Kathleen Seal were married for over 21 years. For the last 18 years of the marriage, Mr. Seal worked for Solid State Communications Corporation (SSC), a small electronics

firm, while Mrs. Seal was a homemaker during most of the marriage. Mr. Seal's compensation at SSC was the sole source of support during the marriage. His salary at SSC was $6,000 per month.

Mr. Seal came into the marriage, in 1968, with well over $100,000 in separate assets. During the marriage, Mr. Seal converted many of these assets into community property by placing them in joint accounts. Mrs. Seal had no significant assets at the time of the marriage.

By the end of the marriage, the parties' net worth was well over $1 million. However, upon completion of divorce case, Mr. Seal was reduced to

financial ruin (with a bankruptcy filing impending) and what few assets remained after payment of exorbitant attorney fee awards was given solely to Mrs. Seal. Mr. Seal questions whether this result comports with the requirements of due process, and whether this state-sanctioned reallocation of wealth constitutes a taking of property without just compensation. A sampling of the facts of the case demonstrates this point.

SSC's worksite is in Hayward, California. In 1978, the company's lease had an option to purchase the Hayward property. Because the option was about to expire, and the corporation could not

afford to exercise it, the option was assigned to Mr. Seal.

Since the marital community did not have the funds to make the purchase, Mr. Seal made the purchase himself, using separate property assets. In recognition of this fact, Mrs. Seal executed a quitclaim deed in the presence of a public notary. The notary later confirmed this fact in a sworn declaration.

At trial thirteen years after the property was purchased, Mrs. Seal testified that she did not know the source of funds used for the downpayment, but that she thought some community funds were going to be

contributed toward buying the building. She also testified that "I may have signed papers, but I was not aware of what the content was."

At trial, Mrs. Seal contended that the Hayward property should be characterized as community property. Her only affirmative proffered evidence to support this position was that Mr. Seal would sometimes give her blank tax forms to sign. There is no evidence that Mr. Seal has ever used the signing of blank documents as a method of defrauding Mrs. Seal.

Nonetheless, the trial court ruled that the Hayward property was community property, and that Mr. Seal had no right

to reimbursement for the $35,000 downpayment. The court did not respond to Mr. Seal's argument that he should at least be reimbursed for $16,879 in mortgage payments and $4,870 in property taxes that he made from separate property after the date of separation. At the time of trial, the Hayward property had an appraised value of $400,000, with a mortgage balance of $90,000.

The trial court found, in its statement of decision, that Mr. Seal had failed to overcome the presumption of California Civil Code section 5110 that the Hayward property was community property. The trial court persisted in

this view, despite Mr. Seal's objection to the statement of decision, citing a California Supreme Court precedent holding that the presumption arising from form of title takes precedence over the more general Civil Code section 5110 presumption.

In connection with his motion for new trial, Mr. Seal again referred the trial court to the applicable authority, In re Marriage of Lucas, 27 Cal.3d 808 (1980). At the hearing on that motion, the court indicated that it had read Lucas "years ago." The court declined an offer to have the relevant portion of the case read to him in court, saying "I will read it later." The court took no

further action on this issue.

In a post trial statement, the trial court reveal that its reasoning was based on pure speculation that notaries will sometimes notarize a document without seeing the party sign it -- "it's probably a no no, but I think we all know it all goes on sometimes." There was no evidence introduced impugning the veracity of the notary, and Mrs. Seal's lawyer never sought to challenge it at trial.

In addition, in the statement of decision the court surmised that Mr. Seal had procured Mrs. Seal's signature on the quitclaim deed by "trick and device." Later, during proceedings on

Mr. Seal's motion for a new trial, the court clarified this finding stating that "[p]erhaps trick and device is not the right word;" and that he meant that Mrs. Seal did not knowingly sign the quitclaim deed. The court reasoned that if Mrs. Seal could not remember signing the quitclaim deed, thirteen years earlier, then she could not have signed the quitclaim deed knowingly.

This is but a small portion of the court's decision, whose entirety is reflected in the Court of Appeal's opinion (see Appendix A). The constraints of space do not allow for more extensive explanation at this time. However, the entire trial court judgment

not only dispossessed Mr. Seal of vested property rights, but also made him solely responsible for Mrs. Seal's inflated and exorbitant attorney fees, over $200,000 in discovery costs wasted on investigation of a corporation known to have a negative net worth, and retroactive spousal and child support awards with no explanation that could form the basis for effective appellate review. The constitutional implications of this state action is discussed below.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents an important question of law which has not been, but

should be, settled by this Court. (Sup. Ct. R. 10.1.)

This case presents the issue of almost total disregard of property rights protected by the Fifth and Fourteenth Amendments, and the reallocation of assets based on 'perceived victimization' rather than the rule of law as required by due process. Also presented is the incredible legal overhead, not only allowed, but actually perpetuated, by at least these California courts against not only an individual, but more importantly our social and economic institutions.

This case will result not only in

the bankruptcy of a successful entrepreneur and the demise of an established twenty year old electronic manufacturing company (including the loss of economic livelihood of its fifty employees) -- but also in the requirement that Mr. Seal leave the country and put his productive energies and talents to work in behalf of another sovereign because the confiscatory and ruinous support obligations and attorney fee awards here cannot be discharged in bankruptcy. The bottom line here is that this country cannot be internationally competitive, and secure our Constitutionally guaranteed freedoms, if productive resources such

as Mr. Seal and his company are squandered.

Mr. Seal, the product of a rural southern Indiana public school system, graduated from M.I.T. with an electronic engineering degree, Harvard Business School with an M.B.A., and the University of San Francisco night law school with a J.D. while working for I.B.M. In 1972, he founded Solid-State Communications, Inc. (SSC) which grew and prospered until 1990 when his wife, a finishing school graduate, filed for divorce and proceeded to tear down everything.

At every stage Mr. Seal achieved honors and held leadership positions

such as valedictorian, class officer, eagle scout, and most recently Chairman of the Northern California Council for the American Electronics Association (AEA) where he actively championed our nation's electronics industry, especially in the international arena. During this process Mr. Seal amassed a net worth well in excess of one million dollars, obviously gained the respect of his peers, and worked hard to further the general welfare.

Mr. and Mrs. Seal jointly owned a house in Hillsbourough, Californian, a majority interest in SSC, and some small savings accounts. Mr. Seal personally owned SSC's building and some residual

savings accounts amassed before marriage.

The property settlement and support obligations should have been straightforward under California law. However, Mrs. Seal gave a blank check to the most expensive San Francisco divorce firm and the following occurred:

1. Mrs. Seal's attorneys ran up fees in excess of $300,000 and forced every move to be as adversarial, drawn out and as expensive as possible.

2. Mrs. Seal's attorneys obtained a court order for discovery proceedings against SSC which turned out to cost well over $200,000 and be extremely disruptive -- especially because of the

impact of the national recession. No consideration was given to the negative impact of this action on an important economic entity upon which 50 people depend for their livelihood.

3. Mrs. Seal was awarded physical custody (legal custody shared) of the children based, in part at least, on the breach of professional privilege by the last of several marriage counselors visited by the couple. Inexplicably, the trial court ignored the following facts in setting child support: Mr. Seal always retained about 80 percent visitation with his son (now he has physical custody and near 100 percent visitation) and about 40 percent

visitation with his daughter (now 50 percent).

During this process Mr. Seal has tried in vain, and to his obvious detriment, to restrain costs and minimize attorney and court time. He even wrote a letter to Mrs. Seal's parents predicting this outcome and its effect on the children's future -- to no avail.

At trial, Mrs. Seal's attorneys pursued a strategy of blaming Mr. Seal for every conceivable wrong by a presentation of half-truths, innuendo and outright fabrication. Mrs. Seal was presented as the victim of "humiliation" and totally under Mr. Seal's control

which, even if true, would have been irrelevant to the settlement. However, the trial judge evidently accepted everything Mrs. Seal and her attorneys inferred and awarded her even more than she requested, as follows:

1. For purposes of child support and alimony, Mr. Seal's salary was almost doubled by imputed income which was non-existent, and his nearly 50 percent visitation with his children was ignored. In addition, the trial judge totally ignored California' very liberal guidelines and awarded an amount exceeding even Mrs. Seal's requests -- and made it totally retroactive

This error is demonstrated by the

fact that a subsequent court has reduced these payments by almost half, and forced Mrs. Seal to pay $4,500 in Mr. Seal's attorney fees for reprehensible behavior. However the original, staggeringly high award remains unpaid.

2. The total cost of the court ordered discovery of SSC which verified Mr. Seal's stated position and confirmed an earlier evaluation submitted by Mr. Seal was, of course, decided by the trial court to be Mr. Seal's sole responsibility.

3. In addition to several other minor awards made as favorable to Mrs. Seal as possible, the trial judge awarded Mrs. Seal almost $100,000 in attorney fees as

a sanction against Mr. Seal for "frustrating" the business discovery. This was in addition to the $200,000 discovery award and after it was pointed out that Mrs. Seal's attorneys had billed at most $7,000 in business-related billings beyond the discovery. The trial judge also made this award with the stated understanding that Mr. Seal did not have the funds available as required by California law. This same judge later allowed Mrs Seal to levy all the remaining funds from the forced sale of their home, without allowing Mr. Seal to keep even enough money to pursue an appeal -- his absolute right under the law.

4. The final award involved the trial judge holding invalid a properly notarized and recorded quitclaim deed Mrs. Seal signed on behalf of Mr. Seal thirteen years earlier for the commercial building housing SSC.

Additionally, he proceeded to order Mr. Seal to pay Mrs. Seal one-half of all unpaid rent retroactively; (not the corporation as he originally ordered, who was not a party) but Mr. Seal personally under no known legal theory.

The California Court of Appeal's opinion (see Appendix A) establishes:

1. That no standard of living had been found as required by California law, but that the trial court obviously had one

in mind and could easily state on sufficient for the finding on remand for that purpose alone.

2. The appeal court did elaborate on the trial court's suggestion that Mr. Seal's parents provide funding to support the judgment; this in the face of no evidence of the capability or willingness to take such unreasonable action. In any case, there is no legal basis for this justification which makes this line of thinking totally irrelevant.

3. Concerning the quitclaim deed, the appeal court essentially found that no matter what the trial court did or did not do, it could lawfully void a fully

perfected real property title document. Unbelievably, this appeal court went on to point out that the disinterested notary did not state in the declaration that they had any personal memory of the signing of the document thirteen years earlier. One can only read this case to required that all legal documents that are notarized and recorded must have not only the notary's declaration supporting their witnessing, but require their personal recollection as well. This imposition on an area as structured as real property titles shows the limits which these courts were willing to go to justify the result they had clearly predetermined. The California Court of

Appeal then buried these results in an unpublished opinion.

This court may not be concerned with Mr. Seal's individual plight, or even with the forced demise of SSC causing the loss of livelihood to its many employees and their families. But this court should be concerned about how many other such takings as this are occurring across the nation, and whether such takings by our legal system should be allowed by our Constitution -- especially when our economic system is faced with the stiffest outside competition ever?

## CONCLUSION

This court should be concerned

about whether we have a system of laws, or if the courts are allowed to rule in favor of the greatest perceived victim, as was done in this case. Do hard work, achievement and the fruits of labor hold any value in our system of law? What minimum factual evidence must accompany a judge's discretion in making property settlement determinations? How much burden will our increasingly expensive legal system be allowed by our Constitution to place on other segments of our society?

We ask the court to determine if due process was applied properly in this case. Furthermore, even if the individual procedures used here are

found to be Constitutional, can the final result -- the complete destruction of a valuable economic entity -- be compatible with the Fifth and Fourteenth Amendments?

The issues raised here have national implications, because of the cumulative burden placed on our economic and social institutions. For the reasons stated herein, petitioner Perry F. Seal, Jr. respectfully submits that the petition for writ of certiorari should be granted.

Respectfully Submitted,

Perry F. Seal

[APPENDIX A: OPINIONS BELOW]

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re Marriage of KATHLEEN and
PERRY SEAL.

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Case No. S038612

(Court of Appeal No. A058507)
(San Mateo Cty. Super. Ct. No. 347633

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KATHLEEN F. SEAL,

Plaintiff and Respondent,

v.

PERRY F. SEAL, JR.,

Defendant and Appellant.

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Petition for review DENIED.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re Marriage of KATHLEEN and
PERRY SEAL.

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Case A058507 (San Mateo Cty.
Super. Ct. No. 347633

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KATHLEEN F. SEAL,

Plaintiff and Respondent,

v.

PERRY F. SEAL, JR.,

Defendant and Appellant.

_____/

Appellant, Perry F. Seal (husband) appeals from a judgment of dissolution ending his marriage to Kathleen F. Seal (wife) and from an order denying him a new trial.

Husband and wife separated in 1990 after a twenty-one and a half year marriage which produced two children. Husband, who has an undergraduate degree from Massachusetts Institute of Technology, an MBA from Harvard and a law degree from University of San Francisco, is the president and controls 90 percent of the stock of a corporation which grosses between $1.4 and $1.9 million dollars annually. For many years, however, the corporation has survived by virtue of large infusions of cash provided by husband's parents. In the spring of 1991 the corporation showed a negative worth of $500,000.

During the marriage it was

husband's practice to use the corporate credit cards to pay for meals, clothing, toys and other family expenses. These expenses were estimated to amount to between $1,500 and $1,700 per month. These sums were not treated by the corporation as income to husband, but instead as set off's reducing its indebtedness to him for the large sums he obtained from his parents and put into the corporation.

The property occupied by husband's corporation (hereinafter the Hayward property) was purchased in 1978 and at the time of trial was worth $400,000. Husband and wife disputed whether it had been purchased with community funds or

with husband's separate monies. A quitclaim deed to the property bearing wife's notarized signature was entered into evidence. Wife testified that she had no recollection of signing such a document, but that she frequently signed blank documents such as tax returns at husband's insistence. Husband testified that she was told that the Hayward property would be in his name alone and that he had never asked her to sign blank tax returns.

Up until a month before the parties separated the corporation had for eight years paid monthly rent for the Hayward property. Such payments were made even when the corporation had a negative

value.

Husband contends that the trial court erred in numerous ways. Many of his objections can be roughly grouped into challenges to findings made, or findings which he argues should have been made as to the income and needs of the parties and the tax consequences to them. A second group of claims relate to the Hayward property and the court's characterization of that property as community in face of a deed to the contrary. Thirdly, husband contends the trial court erred in making him personally liable to wife for payment of her portion of the corporate rent. Lastly he challenges the award to wife

of attorney and accountant fees.

## Discussion

### a. Adequacy of Findings

Husband contends that the statement of decision is inadequate because it fails to explicitly describe the standard of living which the parties maintained during the marriage. Such a finding is required under Civil Code

section 4801.[1] While the statute does not require that the standard of living be defined in any particular fashion it has been held that "a general description" of the parties' "station in life" should be made by the trial court. (In re Marriage of Smith (1990) 225 Cal.App.3d 469, 491.) Such "[f]indings should be 'specific' enough to be

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[1] "In any judgment decreeing the dissolution of a marriage ... the court may order a party to pay for the support of the other party any amount ... as the court may deem just and reasonable, based on the standard of living established during the marriage." (Civ. Code, § 4801, subd. (a).)

helpful in subsequent appellate or modification proceedings." (Ibid.) The purpose of the finding is to permit meaningful appellate review of the trial court's order.

It is quite possible to infer from the statement of decision and the comments of the court that it had a clear sense of the marital standard of living. What is lacking is an express statement of the standard. Wife testified to the value of the family home, the parties' habits as to travel, vacation, eating out, and other recreation. It would therefore be a simple matter for the trial court upon remand to amend its statement of

decision with a characterization of the standard of living maintained during the marriage. When it clarifies the marital standard of living the court can also set out whether its award of support permits the parties to maintain that standard or whether the support awards were reduced to accommodate husband's present ability to pay.

Husband also challenges the statement of decision for lacking an itemization of the separate needs of the wife and children.[2] The court found "the

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[2] Husband relies upon the language in Civil Code section 4700, subdivision (a) which provides that in making an award of child support "the

court shall make" upon request "appropriate findings with respect to the circumstances on which the order" for child support "is based." He contends that specific findings should have been included here.

While the language of Civil Code section 4700 speaks specifically of "findings," it is not at all clear that with the abolition of findings of fact (Code Civ. Proc., §63) the findings of section 4700 are not now encompassed within the statement of decision. (See Hogoboom & King, Cal. Practice Guide: Family Law 1 (Rutter 1989) §15.27.1 rev. #1, 1993.) In any event this case is completely distinguishable from In re Marriage of Wood (1983) 141 Cal.App.3d 671, 681, in

reasonable monthly needs of W and the children are $3,760.00." In August 1991 wife filed an expense declaration listing her needs and those of the children as amounting to $4,1000 a month. That total reflected some $300 in medical costs. Since wife had physical custody of both children it is not clear how the court could have broken out the costs any more specifically.

Husband objected that the tentative decision was unclear as to whether

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which the trial court did not provide either findings of fact and conclusions of law or a statement of decision. (Id. at p. 675.)

medical costs had been included in the support award. The answer to that question was clarified in the statement of decision as filed where it was provided that husband would pay, on reasonable notice, any uninsured medical or dental expenses for the children.

Husband misleadingly relies on In re Marriage of Ramer (1986) 187 Cal.app.3d 263, 271. apparently in that case the statement of decision did not contain any income or expense figures. (Ibid.) Here the statement of decision itemized wife's sources of income and the amount of monthly expense attributable to her and the children. This statement of decision was

sufficiently specific to pass muster.

The court calculated husband's net monthly income to be $5,532, including $1,500 in "corporate credit card income." Husband objects that the average of $1,500 a month he charged in family expenses to his corporate account was not income to him because for accounting purposes the corporation set those sums off against the far greater amounts he was owed by the business for his cash infusions into it. regardless of the "correct" manner for characterizing this sum -- husband's expert held it was not income while wife's maintained that it was -- as a practical matter husband was receiving

the benefit of $1,500 a month. We cannot say the trial court erred in treating the value of the monthly charges as income to husband.

The trial court also imputed $584 per month to husband as his community share of the rent paid by the corporation as a tenant. Husband objects that this is speculative income in that the corporation had not made rent payments for over a year. However, there was evidence that the corporation after paying its rent regularly for over eight years ceased to do so a month before the dissolution was filed. It had paid rent even in years when the corporation itself had a negative value.

Moreover, husband testified that he, as the managing officer of the corporation, made the decision whether or not rent would be paid. Because husband controlled the corporation's rent payments, choosing to make them or not we cannot say that the court erred in imputing rental income to husband.

Husband also objects that the trial court erred in excluding from wife's income any interest she may earn on her portion of the proceeds from the sale of the family house. I did so noting that wife intended to use those proceeds to buy another house and would face "capital gains taxes." In his objections to the tentative decision

husband pointed to the court's treatment of wife's capital gains liability in arguing the she had assets and therefore the ability to pay her own attorney and accounting fees. He did not object tot he fact that he too would have capital gains liability for which the court made no specific allowance. Accordingly, he has waived any error the trial court may have made by failing to take his capital gains tax liability into account.

b. Hayward Property

The court found the Hayward property which the corporation leased to be a community asset and ordered husband to execute a grant deed naming wife as

a 50 percent tenant in common. At trial husband introduced a quitclaim deed in his favor signed by wife and dated August 16, 1978.

The statement of decision noted that although husband claimed he had purchased the property with his separate funds he had failed to document that claim. "Based upon the evidence, the Court finds that H procured W's signature on the quitclaim to this property by trick or device. Moreover, H admits ... that he often paid the mortgage and taxes on this property from community funds. Although he claims that the community was reimbursed for such expenditures, he was unable to

produce any documentary evidence of such reimbursement. The presumption in Civil Code section 5110 applies, and has not been overcome."

Husband reads the statement of decision to mean that the trial court applied the presumption of Civil Code section 5110 -- the general presumption that property acquired during marriage is community property -- to find that the Hayward property belonged to the community. If it did so it erred because the presumption which arises from the form of title (Evid. Code, §662), husband's sole ownership, removes the property from the general presumption of Civil Code section 5110.

(In re Marriage of Lucas (1980) 27 Cal.3d 808, 814-815.)

We do not read the statement of decision as husband does. Several sentences earlier the trial court concluded that the quitclaim deed was "obtained by trick or device." Clear and convincing evidence is required to overcome the presumption raised by the form of legal title. We find no reason to question that this was the standard applied by the trial court.

Wife testified that she habitually signed blank documents because husband insisted that she was too poorly educated to understand business matters. She also testified that she was unaware

of how title was held to the assets they acquired during the marriage, but believed that the Hayward property had been purchased out of their savings. She had no recollection of signing the quitclaim deed, although she conceded that the signature on it was hers. She could remember only once signing a document in front of a notary and that occurred when the parties opened an equity line of credit in Oakland. The quitclaim deed was dated August 15, 1978, and notarized the following day by a San Mateo County notary. At the motion for new trial the court noted that the declaration of the notary did not state that she had any recollection

of personally witnessing wife's signature to the deed.

The trial court had the parties before it and was able to assess their credibility. We cannot say that its sense of their veracity, combined with the evidence of husband's practice of asking wife to sign blank documents falls short of the clear and convincing evidence necessary to overcome the presumption recrated by the quitclaim deed.

c. Reimbursement of Mortgage and Tax Payments

Husband asserts, in reliance upon In re Marriage of Epstein (1979) 24

Cal.3d 76, that the trial court erred in failing to reimburse him for payments he made post separation for taxes and the mortgage on the Hayward property. He contended at trial that post separation he made -- out of his separate property -- mortgage payments of $16,879 and tax payments of $4,870.

Epstein holds that normally a spouse is entitled to reimbursement of post separation payments that a spouse makes with separate property for pre-existing community debts. (In re Marriage of Epstein, supra, 24 Cal.3d at p. 84.) However, the case goes on to list several exceptions to that general rule one of which is when "the payment

was made on account of a debt for th
acquisition or preservation of an asse
the paying spouse was using and th
mount paid was not substantially i
excess of the value of the use." (Id
at pp. 84-85.) In this instance husban
was using the Hayward property as th
site for his corporate business.
Presumably something like the marke
value of the site's use was reflected i
its monthly rental cost of $2,715
Husband's monthly out-of-pocket cost wa

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[3] The trial court also refuse
to provide wife reimbursement o
mortgage payments she made pos
separation during her period o
exclusive occupancy of the famil
residence.

$923 (mortgage payments) plus $196 (taxes). Husband therefore was obtaining use of the property at a cost to him of less than half its rental value. In that circumstance the trial court could quite appropriately refuse to allow him reimbursement for his expenses in connection with the Hayward property.

d. Back Rent Proceeds

In 1990 husband had been ordered by the court to distribute to wife one half (or $584.12) of any net income from rental of the Hayward property. In the 20 months between the date the parties separated and trial, rent payments were

made by the corporation for only 2 months. Wife had received no rent proceeds for that period as of the date of trial.

By its judgment the trial court ordered husband to pay wife her half of the net monthly income from the property plus interest retroactive to February 1, 1990. In response to husband's claim that the corporation couldn't afford to pay rent for a year and a half, the court noted that husband had failed to provide wife with the court ordered accountings demonstrating the corporation's financial plight.

Husband insists that the trial court erred in making him personally

liable for the rent which was owed by the corporation and was not his personal liability. Husband testified that he is president, chairman, and controls 90 percent of the stock in the corporation. He further testified that whenever he was told the corporation could not afford to pay rent he would direct the accounting department not to make the payment.

We are not persuaded that what the court did was pierce the corporate veil in holding husband to account for wife's portion of the net rent proceeds. Husband by his own admission decides when the corporation will pay rent; indeed it had consistently done so prior

to separation even when it had a negative value. Just as he has continued to loan the corporation money to stave off its collapse he has decided to forgo rent. While those decisions may or may not make good business sense, to the extent that his decisions implicate community assets he cannot require wife to forgo her half of the monies those assets would otherwise be earning.

e. Fee Award

Lastly, husband objects to the award made by the trial court to wife of half of her attorney fees (both for trial and on the motion for new trial)

and accountant fees.[4]

We do not reverse such awards absent a clear showing that the trial court abused its discretion. (In re Marriage of Sullivan (1984) 37 Cal.3d 762, 768-769; In re Marriage of Hublou (1991) 231 Ca.App.3d 956, 965.)

In making the fee award the trial court noted the existence of

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[4] At trial the court reduced the fee claim made by wife's counsel to $85,000 and ordered husband to pay 50 percent or $42,000 plus half of her accountant fees, or $12,500.

After denying husband's motion for new trial the court also ordered husband to pay $2,500 toward wife's attorney fees.

"considerable evidence before the Court that H has, by stalling and failing to cooperate with respect to the property issues in this case, and by his negligent handling and intermixing of the community's funds with those of his own, substantially increased W's attorneys and accountant's fees. Counsel for W also argues that H has been unreasonable with respect to child custody/visitation matters; while that may be so, this Court finds that placement of blame in custody/visitation matters an almost impossible task. Considering, as it must, however, the 'extent to which the conduct of each party ... furthers or frustrates the

policy of the law to promote settlement of litigation.' H clearly emerges as the primary 'frustrator.'"

"The court's file in this case is in two volumes, including settlement conferences and contested appearances, these parties have been before the court ten times prior to trial.... It may well be that, had H been more forthcoming with W and her attorney about their financial affairs, W.s attorney would not be claiming $120,000.00 in attorneys fees and $25,000 in accountants fees. It may also well be that H could not be forthcoming at an early stage because he himself was not conversant with the finances, having failed to prepare

financial statements and corporate tax returns for almost a decade. Either way, he should shoulder most of the blame."

The statutory language which the court quotes is contained in Civil Code section 4370.6, subdivision (a).[5]

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[5] This section, added effective January 1, 1991, incorporated language formerly contained in Civil Code section 4370.5.

Civil Code section 4370.6, subdivision (a) further provides in pertinent part: "An award of attorney fees and costs pursuant to this section is in the nature of a sanction.... [T]he court shall take into consideration all evidence concerning the parties' incomes, assets, and abilities. The

Husband argues on appeal that the trial court erred to the extent it sanctioned him with the fee award for his poor financial record keeping during the marriage rather than for his conduct in the course of litigation which is the focus of the section. (In re Marriage of Norton (1988) 206 Cal.App.3d 53, 58 [under former Civ. Code, §4370.5, subd. (b)(2)].)

We read the trial court to say only that husband may not have been able

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court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden upon the party against whom the sanction is imposed...."

early on to provide financial information because he had such poor records. Such a statement is not inconsistent with the view that husband, nonetheless thwarted settlement of the property issues. Even when ordered to do so he had failed to provide wife with monthly accountings. On these facts we cannot say the court misapplied the law.

Husband also challenges the amount of the fee award, arguing that he should only be sanctioned for that portion of the fees attributable to financial matters, rather than to issues of custody and visitation. Wife's attorney when asked how much of his fee was attributable to tax questions and issues

related to the corporation said he had no breakdown, but testified "My estimate is probably 30 percent more time [was] involved in the totality of this case due to my concern about the ability to rely on .. both the representations and documents...." We cannot read that testimony to mean that only 30 percent of the hours chargeable to wife by her counsel should be allocated to the financial matter for which husband was being sanctioned.

Husband similarly contends that wife should not be awarded fees incurred in her attempts to value the corporation after December 1990 when it finally filed its belated corporate tax returns.

we are not prepared to say that it was an abuse of discretion for husband to pay a portion of wife's expenses in attempting to unravel from the tangled skein of transactions the threads of community and corporate assets.

Lastly husband argues the award must be reversed because he argues it represents an " unreasonable financial burden" upon him. The court directed: [t]o the extent that H's share [of the funds on deposit] is insufficient to pay the attorneys/accountants fees ordered herein, such deficit is not to prevent division of the frozen assets." Husband takes this statement to mean that the court recognized that he would be unable

to pay the fee award. We do not read it so expansively. Moreover, the section requires the court to "take into consideration all evidence concerning the parties' income, assets and abilities." Here there was ample evidence that husband's abilities may be underused in his present position and thus his income reduced. Moreover, he has consistently obtained large sums of money form his parents which makes it obvious that his present assets may not accurately reflect his ability to pay a fee award.

Finally, husband argues it was an abuse of discretion to award wife $2,500 in attorney fees for responding to his

motion for new trial. Husband maintains that the court failed to consider husband's ability to pay or to disclose the authority for the award. Where the only basis upon which wife had asked for fees was Civil Code section 4370.6 we assume that the award was made under that section. Moreover, since it was an award by the same judge who heard the trial we see no reason to assume that the court was suddenly unaware of husband's ability to pay. Although wife requested $3,450 in fees, the court awarded only $2,500.

The trial court did not abuse its discretion in making the awards for professional fees incurred by wife.

## Disposition

The case is remanded to the trial court solely for it to make a finding on the standard of living during the marriage. In all other respects the judgment is affirmed.